Green Crescent Resources v Ching Miew Yoke & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-398–03 OF 2014
ALIZATUL KHAIR, ROHANA YUSUF AND NALLINI PATHMANATHAN JJCA
12 JANUARY 2016

Contract — Agreement — Contra agreement — Sale and purchase of unit — Payment to be set off by way of contra agreement entered into by developer and purchaser — Arrangement not made in writing nor expressly stipulated in sale and purchase agreement between the purchaser and vendor — Vendor terminated sale and purchase agreement due to purchaser's failure to pay balance purchase price — Whether 'contra arrangement' given cognisance by vendor — Whether vendor effectively bound by contra-arrangement — Whether contra arrangement gave rise to legally enforceable agreement — Whether purchaser entitled to legal and beneficial ownership of unit

The primary issue that arose in this appeal was whether a debt due and owing by the main contractor of a mixed development project HAC Builders Sdn Bhd, ('HAC Builders') to its subcontractors, Qudotech Sdn Bhd ('Qudotech') and Fei Wong Letrik Sdn Bhd ('Fei Wong Letrik') ('the plaintiffs') in the High Court was effectively set off or settled by virtue of a 'contra-arrangement'. Pursuant to a 'contra-arrangement', a unit ('Unit A-3-1B') was allegedly given to Qudotech in settlement of the sum of RM97,845.29. Qudotech, in turn, nominated one Ching Miew Yoke ('the purchaser') as the beneficiary of Unit A-3-1B. Notwithstanding this 'contra-arrangement', the purchaser was required to execute a sale and purchase agreement ('SPA') for the said unit with the vendor, Green Crescent Resources Sdn Bhd ('Green Crescent'). In view of the 'contra-arrangement', the purchase price for the said unit was deemed settled, entitling the purchaser to legal and beneficial ownership of the said unit. This arrangement was not made in writing nor was it expressly stipulated in the SPA between the purchaser and Green Crescent. No instalment payments were made by or on behalf of the purchaser to Green Crescent. Subsequently Green Crescent terminated the SPA for Unit A-3-1B on the ground that the purchaser failed to pay the balance purchase price. In short the 'contra arrangement' between HAC Builders and Qudotech and Fei Wong Letrik was not given cognisance by Green Crescent Resources. The plaintiffs in the High Court maintained that Green Crescent was effectively 'bound' by the contra-arrangement between HAC Builders, Qudotech and Fei Wong Letrik because a common director of Green Crescent and HAC Builders, namely one Yap Ah Bee, was the person who had negotiated this 'contra-arrangement' with Qudotech and Fei Wong Letrik Sdn Bhd. Therefore, the plaintiffs' contention

was that the corporate veils of Green Crescent and HAC Builders ought to be lifted and it would be noted that these companies worked effectively as a single entity. The trial judge concluded that such a contra arrangement did in fact give rise to a legally enforceable agreement ie the purchaser was entitled to ownership of the subject unit.

Held, allowing the appeal with costs:

(1) The trial judge failed to consider that all the contemporaneous documentary evidence pertaining to the alleged contra agreement subsisted only between HAC Builders and Qudotech. Such contemporaneous documents comprised letters between HAC Builders and the subcontractors. There were no letters to or from Green Crescent. In the absence of any contemporaneous documents from Green Crescent, the lack of any board minutes or resolutions of any kind in relation to the alleged 'contra agreement', such consent could not be reasonably inferred. There was insufficient evidence available to warrant an inference that the corporate veils of these entities should be so lifted. Apart from the subsequent oral evidence of Yap Ah Bee which was largely self-serving there was no other cogent evidence to support the application of the doctrine (see paras 48, 50 & 59).

(2) Yap Ah Bee's conduct was wholly inconsistent, and negated the existence of a binding contra agreement between Green Crescent, Qudotech and Fei Wong Letrik. As such, the trial judge erred in accepting Yap Ah Bee's evidence to conclude that a contra agreement which was binding on Green Crescent subsisted so as to endow legal and beneficial ownership on the plaintiffs without the payment of any consideration. The trial judge also failed to consider that the existence and effect of the contra agreement was not addressed in the standard form SPA. In these circumstances, the SPA prevailed over any alleged contra agreement (see para 56).

(3) In an attempt to procure the plaintiffs to complete the project notwithstanding the lack of payment, HAC Builders through its director Yap Ah Bee, induced Qudotech and Fei Wong to complete their subcontract works with the promise of the transfer of certain housing units in place of monies. However these statements and offers remained inducements which did not become legally enforceable because no such offer emanated directly from Green Crescent. The doctrine of the privity of contract precludes any such statements or arrangements from becoming binding on Green Crescent, as it was never privy to, nor party to the same (see para 57).

(4) Any contra arrangement would ideally have required the existence of a written agreement whereby the debt due and owing by the main contractor, HAC Builders to Qudotech and Fei Wong Letrik being

novated to Green Crescent and then resolved by the transfer of the relevant housing units to these subcontractors. That was not the case here. There was no nexus between the debt due and owing by HAC Builders to the subcontractors and Green Crescent (see para 58).

[Bahasa Malaysia summary

Isu utama yang berbangkit dalam rayuan ini adalah sama ada hutang yang kena dibayar oleh kontraktor utama projek pembangunan gabungan HAC Builders Sdn Bhd, ('HAC Builders') kepada subkontraktor-subkontraktornya, Qudotech Sdn Bhd ('Qudotech') dan Fei Wong Letrik Sdn Bhd ('Fei Wong Letrik') ('plaintif-plaintif') di Mahkamah Tinggi secara efektif set off atau diselesaikan mengikut 'contra-arrangement'. Berikutan 'contra-arrangement', unit ('Unit A-3-1B') didakwa diberikan kepada Qudotech dalam penyelesaikan jumlah sebanyak RM97,845.29. Qudotech, sebaliknya, mencalonkan Ching Miew Yoke ('pembeli') sebagai benefisiari kepada Unit A-3-1B. Walaupun dengan 'contra-arrangement', pembeli dikehendaki untuk melaksanakan perjanjian jual beli ('PJB') bagi unit tersebut dengan penjual, Green Crescent Resources Sdn Bhd ('Green Crescent'). Mengambil kira 'contra-arrangement', harga belian bagi unit tersebut dianggap selesai, memberi hak kepada pembeli kepada pemilikan sah dan benefisial terhadap unit tersebut. Pengaturan ini tidak dibuat secara bertulis ataupun ia ditetapkan secara nyata dalam PJB di antara pembeli dan Green Crescent. Tiada bayaran ansuran dibuat oleh atau bagi pihak pembeli kepada Green Crescent. Green Crescent kemudiannya menamatkan PJB untuk Unit A-3-1B tersebut atas alasan bahawa pembeli gagal untuk membayar baki harga belian. Pendek kata 'contra arrangement' di antara HAC Builders dan Qudotech dan Fei Wong Letrik tidak diberi perhatian oleh Green Crescent Resources. Plaintif-plaintif di Mahkamah Tinggi mengekalkan bahawa Green Crescent secara efektif 'bound' oleh penyusunan kontra di antara HAC Builders, Qudotech dan Fei Wong Letrik kerana pengarah biasa Green Crescent dan HAC Builders, iaitu seorang yang bernama Yap Ah Bee, adalah orang yang berunding 'contra-arrangement' ini dengan Qudotech dan Fei Wong Letrik Sdn Bhd. Oleh itu, hujahan plaintif-plaintif adalah bahawa tabir korporat Green Crescent dan HAC Builders patut disingkap dan ia akan diambil perhatian bahawa syarikat-syarikat ini beroperasi secara efektif sebagai entiti tunggal. Hakim bicara memutuskan bahawa penyusunan kontra sedemikian sebenarnya memberikan kebangkitan kepada perjanjian yang dikuatkuasa dari segi undang-undang iaitu pembeli berhak kepada pemilikan unit tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Hakim bicara gagal untuk mempertimbangkan bahawa kesemua keterangan dokumentar semasa berkaitan kepada perjanjian kontra yang didakwa wujud hanya di antara HAC Builders dan Qudotech. Dokumen semasa sedemikian terdiri daripada surat-surat di antara HAC Builders

dan subkontraktor-subkontraktor. Tidak terdapat surat kepada atau daripada Green Crescent. Dalam ketiadaan apa-apa dokumen semasa daripada Green Crescent, ketiadaan apa-apa minit-minit lembaga atau resolusi dalam apa jua bentuk berkaitan kepada 'contra agreement' yang didakwa, izin sedemikian tidak dapat disimpulkan secara munasabah. Tidak terdapat keterangan yang mencukupi untuk mewajarkan campur tangan bahawa tabir korporat entiti-entiti ini patut disingkap. Selain daripada keterangan lisan seterusnya oleh Yap Ah Bee yang mana sebahagian besarnya kebimbangan untuk diri sendiri, tidak terdapat keterangan menyakinkan yang lain untuk menyokong permohonan doktrin tersebut (lihat perenggan 48, 50 & 59).

(2) Tingkah laku Yap Ah Bee secara keseluruhannya tidak konsisten, dan menyangkal kewujudan perjanjian kontra mengikat di antara Green Crescent, Qudotech dan Fei Wong Letrik. Dengan itu, hakim bicara tersilap dalam menerima keterangan Yap Ah Bee untuk memutuskan bahawa perjanjian kontra yang mana mengikat ke atas Green Crescent wujud untuk memberikan pemilikan sah dan benefisial ke atas plaintif-plaintif tanpa bayaran balasan. Hakim bicara juga gagal untuk mempertimbangkan bahawa kewujudan dan kesan perjanjian kontra tidak dibincangkan dalam borang standarad PJB. Dalam keadaan ini, PJB mengatasi apa-apa perjanjian kontra yang didakwa (lihat perenggan 56).

(3) Dalam percubaan untuk mendapatkan plaintif-plaintif untuk menyiapkan projek walaupun tidak dibayar, HAC Builders melalui pengarahnya Yap Ah Bee, memujuk Qudotech dan Fei Wong untuk menyiapkan kerja-kerja subkontrak mereka dengan perjanjian untuk memindahkan unit perumahan tertentu sebagai ganti wang. Walau bagaimanapun pernyataan-pernyataan dan tawaran ini kekal pendorong yang tidak boleh dikuatkuasakan dari segi undang-undang kerana tiada tawaran sedemikian datang terus daripada Green Crescent. Doktrin priviti kontrak menghalang pernyataan-pernyataan sedemikian atau penyusunan daripada mengikat ke atas Green Crescent, kerana ia tidak pernah privi kepada, ataupun parti kepadanya (lihat perenggan 57).

(4) Apa-apa penyusunan kontra secara ideal memerlukan kewujudan perjanjian bertulis di mana hutang yang kena dibayar oleh kontraktor utama, HAC Builders kepada Qudotech dan Fei Wong Letrik diserahkan haknya kepada Green Crescent dan kemudiannya selesai dengan pemindahan unit rumah yang relevan kepada subkontraktor-subkontraktor ini. Ini tidak berlaku di sini. Tidak terdapat neksus di antara hutang yang kena dibayar oleh HAC Builders kepada subkontraktor-subkontraktor dan Green Crescent (lihat perenggan 58).]

Notes

For cases on agreement in general, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3255–3345.

Cases referred to

Anderson v City of Bessemer 470 US 564 (1985), SC (refd)
Carlyle v Royal Bank of Scotland plc [2015] UKSC 13, SC (refd)
Clarke v Edinburgh and District Tramways Co Ltd [1919] SC (HL) 35, HL (refd)
Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd [2014] 1 MLJ 80; [2013] 9 CLJ 828, FC (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals [2015] 1 MLJ 773; [2015] 1 CLJ 719, FC (refd)
Henderson v Foxworth Investments Ltd and another [2014] UKSC 41, SC (refd)
McGraddie v McGraddie and another [2013] UKSC 58, SC (refd)
Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka [2014] 9 CLJ 1064, FC (refd)
Prest v Prest and others [2013] 4 All ER 673, SC (refd)
Thomas v Thomas [1947] AC 484, HL (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Yuill v Yuill [1945] P 15, CA (refd)

Appeal from: Civil Suit No 22 NCVC-78–01 of 2013 (High Court, Shah Alam)

Kirubakaran (S Malar with him) (Kiru & Yong) for the appellant.
M Muthuraman Muthu (Muthu & Partners) for the respondents.

Nallini Pathmanathan JCA:

INTRODUCTION

[1] The primary issue that arose for consideration in this appeal was whether a debt due and owing by the main contractor of a mixed development project, one HAC Builders Sdn Bhd, the second defendant in the court below ('HAC Builders') to its subcontractors, Qudotech Sdn Bhd, the third plaintiff in the court below ('Qudotech') and Fei Wong Letrik Sdn Bhd, the second plaintiff in the court below ('Fei Wong Letrik') was effectively set off or settled by virtue of a 'contra-arrangement' whereby HAC Builders agreed to give

Qudotech four units in the mixed development in return for the extinguishment or settlement of the debt.

[2] Pursuant to this 'contra-arrangement' a unit, namely Unit A-3-1B was allegedly 'given' to Qudotech in settlement of the sum of RM97,845.29. Qudotech in turn nominated Ching Miew Yoke, the first plaintiff in the court below ('the purchaser') as the beneficiary of Unit A-3-1B.

[3] Notwithstanding this 'contra-arrangement', the purchaser was required to execute a sale and purchase agreement for the said unit with Green Crescent Resources Sdn Bhd, the first defendant in the court below and the vendor under the sale and purchase agreement ('Green Crescent'). In view of the 'contra-arrangement' in so far as the purchaser and the other plaintiffs were concerned, the purchase price for the said unit was deemed settled, thereby entitling the purchaser to legal and beneficial ownership of the said unit.

[4] This arrangement was not made in writing nor was it expressly stipulated in the sale and purchase agreement between the purchaser and Green Crescent, the vendor. No instalment payments were therefore made by or on behalf of the purchaser to the vendor, Green Crescent Resources.

[5] Subsequently Green Crescent Resources, the vendor, terminated the sale and purchase agreement for Unit A-3-1B on the ground that the purchaser had failed to pay the balance purchase price. In short the 'contra arrangement' between HAC Builders and Qudotech and Fei Wong Letrik was not given cognisance by Green Crescent Resources.

[6] In this context it is pertinent to bear in mind that the plaintiffs in the court below maintain that Green Crescent Resources was effectively 'bound' by the contra-arrangement between HAC Builders, Qudotech and Fei Wong Letrik. The reason for such an assumption was because a common director of Green Crescent and HAC Builders, namely one Yap Ah Bee, was the person who had negotiated this 'contra-arrangement' or 'contra-settlement' with Qudotech and Fei Wong Letrik Sdn Bhd. Therefore the plaintiffs' contention was that the corporate veils of Green Crescent and HAC Builders ought to be lifted whereupon it would be noted that these companies worked effectively as a single entity. The appellant, Green Crescent Resources disputes this.

[7] As Unit A-3-1B was not transferred to the purchaser, the plaintiffs in the court below initiated this action against Green Crescent Resources and HAC Builders Sdn Bhd seeking declarations, inter alia, that:

(a) the purchaser is the legal and beneficial owner of the said unit;

(b) the termination of the sale and purchase agreement between the purchaser and Green Crescent Resources is bad in law; and alternatively,

(c) damages.

[8] It is therefore apparent that the primary issue that fell for consideration was whether the 'contra-arrangement' or 'contra-settlement' amounted to a legally binding and enforceable agreement whereby Green Crescent Resources as vendor of the subject unit was bound to give legal and beneficial ownership of the said unit to the purchaser.

[9] Put another way, the issue for consideration by the court was whether the 'agreement' between HAC Builders Sdn Bhd and Qudotech and Fei Wong Letrik Sdn Bhd for the set off and/or settlement of a debt gave rise to a valid and enforceable agreement for the transfer of legal and beneficial ownership of Unit A-3-1B to the purchaser.

THE DECISION OF THE HIGH COURT

[10] In the High Court, the learned trial judge concluded that such a contra-arrangement did in fact give rise to a legally enforceable agreement whereby the first plaintiff, ie the purchaser, became entitled to ownership of the subject unit.

OUR DECISION

[11] On appeal we reversed the decision of the High Court, holding that we were unable to conclude with any degree of certainty that there was a binding 'contra' arrangement between Green Crescent Resources Sdn Bhd, HAC Builders Sdn Bhd and Qudotech because:

(a) all the contemporaneous documentary evidence pertaining to the alleged contra agreement is between HAC Builders Sdn Bhd and Qudotech Sdn Bhd;

(b) there is no contemporaneous documentary evidence from Green Crescent confirming the existence of the alleged contra agreement;

(c) the only evidence relied upon by the plaintiffs to confirm the existence of a binding contra agreement with Green Crescent Resources Sdn Bhd is the oral evidence of one Yap Ah Bee, who was a common director of Green Crescent, HAC Builders and their parent company;

(d) however Yap Ah Bee signed a standard form sale and purchase agreement with Qudotech on behalf of Ching Miew Yoke which makes no reference whatsoever to the contra agreement;

(e) on the one hand Yap Ah Bee in his subsequent oral evidence at trial shows that he purportedly agreed to a contra agreement between Green Crescent Resources, HAC Builders and Qudotech; yet on the other hand he executed an agreement with Qudotech which required payment of the full purchase price by Qudotech;

(f) in these circumstances his conduct is wholly inconsistent, and negates the existence of a binding contra agreement between D1, D2 and P3;

(g) there was insufficient basis to warrant the lifting of the corporate veil on the factual matrix of this case to come to any other conclusion; and

(h) finally the subsequent conduct of Green Crescent Resources is insufficient to support the existence of a binding contra agreement.

[12] On these broad grounds we agreed with Green Crescent Resources that the learned trial judge had erred in arriving at her decision, and accordingly allowed the appeal and set aside her decision. We append below the full reasons for our decision.

Salient background facts

[13] As set out above, the first plaintiff in the court below is the purchaser and Green Crescent, the first defendant in the court below is the vendor of Unit A-3-1B. Unit A-3-1B comprises part of a mixed development known as the Serdang Perdana Project. Green Crescent is the developer of the said project.

[14] The purchaser and Green Crescent executed a sale and purchase agreement dated 20 July 2001. The agreed purchase price of the said unit was RM92,800. It is undisputed that the purchaser did not pay a single cent towards that sum.

[15] On the basis that there was no consideration, Green Crescent terminated the sale and purchase agreement via a notice dated 2 July 2007.

[16] The purchaser pleaded that she did not need to pay the purchase price because it had been settled by way of the 'contra' or set off of a debt owed by HAC Builders to Qudotech. It was further averred that this contra agreement or arrangement had been expressly consented to by the vendor, Green Crescent.

[17] Green Crescent however denied both the existence of and agreement to the alleged 'contra' settlement.

[18] At trial, the relationship between Green Crescent and HAC Builders, namely the first and second defendants, was explained by one Yap Ah Bee ('PW2') as follows: Green Crescent and HAC Builders were wholly owned by a public listed company, Hiap Aik Construction Bhd (HACB). Yap Ah Bee was one of the shareholders and a director of HACB. He was also a common director of Green Crescent and HAC Builders.

[19] According to Yap Ah Bee, all three companies, namely Green Crescent, HAC Builders and HACB, the public listed company, had the same directors, were administered from one business address and treated as one commercial entity for the purposes of administration and accounting.

[20] Green Crescent appointed HAC Builders as the main contractor for the Serdang Perdana Project.

[21] HAC Builders, as main contractor, appointed Qudotech as its subcontractor for electrical, telephone, cold water and sanitary plumbing services.

[22] Qudotech in turn appointed Fei Wong Letrik Sdn Bhd, as a subcontractor to complete electrical services for certain building blocks in the project.

[23] In the middle of the project, HAC Builders and Green Crescent faced financial difficulties. HAC Builders could not pay Qudotech for services performed by it as well as Fei Wog Letrik Sdn Bhd.

[24] As of 20 March 2001, HAC Builders owed Qudotech RM768,181. Qudotech in turn owed Fei Wong Letrik Sdn Bhd the sum of RM92,800.

[25] Qudotech pressured Yap Ah Bee, the then director of HAC Builders as well as Green Crescent, for settlement. The solution arrived at was for the outstanding sums due to all the subcontractors to be settled by giving them properties in the project.

[26] In a discussion held on 19 April 2001, HAC Builders agreed to offer four properties by way of settlement of its debt to the Qudotech. The unit in dispute in this civil suit, was one of the subject units. The offer was accepted by the Fei Wong Letrik, Qudotech and the other subcontractors.

[27] Qudotech then nominated its subcontractor to receive the 'contra' units. Fei Wong Letrik was nominated to receive the unit under dispute here. Fei Wong Letrik in turn nominated the purchaser to receive the said unit.

[28] Through its invoice dated 6 March 2006, Green Crescent requested payment of the water and electricity deposit of RM230 of the said unit from the second plaintiff. This was paid by Phang Tat Chun ('PW3'), the purchaser's godfather.

[29] By an invoice dated 27 March 2006, Green Crescent demanded payment of the purchase price from Fei Wong Letrik. This was followed up with two reminder letters.

[30] Green Crescent refused to give vacant possession of the unit to Fei Wong Letrik and terminated the SPA via a notice dated 2 July 2007 on the basis that it did not pay the purchase price.

[31] On 20 January 2014, the High Court was informed that the subject property had been sold off.

[32] The High Court held that the plaintiffs had proved their case on a balance of probabilities and allowed the plaintiffs' claim. As stated earlier, we reversed the decision of the High Court for the broad reasons set out in para 11.

The appellant's submissions

[33] Green Crescent denied liability essentially on the following basis:

[34] It denied being party to any agreement in relation to the 'contra' settlement. Green Crescent as the developer and vendor of these housing units asserted that neither HAC Builders and/or HACB have the right to give away any of the units developed by Green Crescent to Qudotech or to anyone else.

[35] Green Crescent also relied on the sale and purchase agreement signed between itself and the purchaser. The sale and purchase agreement dated 24 July 2001 ('SPA') states the purchase price and further stipulates that without the payment of any consideration, the purchaser cannot become the beneficial owner of the said unit.

[36] As the vendor, Green Crescent contended that the plaintiffs did not prove the existence of the 'contra' agreement by producing any written documents or board resolutions or company minutes from Green Crescent recording the existence of such an agreement. Further, there was no contractual relationship between Qudotech and Green Crescent. In short, Green Crescent relied on the fact that it was a separate legal entity from HAC Builders and therefore could not be bound by any promise emanating from either HAC Builders or even its public listed holding company, HACB.

[37] Neither the SPA nor the recitals in it made reference to the 'contra' agreement or stated that the said documents were collateral to the 'contra' agreement. In these circumstances a cautious approach ought to be adopted towards finding or inferring an oral collateral contract, particularly where the terms of such an oral agreement are contradictory with the written SPA. In this context, it is pertinent that the purchaser signed the SPA subsequent to, and notwithstanding the 'contra-arrangement' between Fei Wong Letrik and other related entities. It follows that the purchaser is bound by the terms of the SPA. The contra-agreement was reached with entities other than Green Crescent, who accordingly had no basis to bind Green Crescent to the terms of the 'contra-agreement'. In other words, Green Crescent was not privy to the terms of the 'contra-agreement' and could not therefore be bound by it. Given the timing and existence of the contemporaneous documents on record, it was untenable for the purchaser to deny that she is bound by the terms of the SPA.

[38] As such Green Crescent contended that the appeal should be allowed as there had been insufficient consideration accorded to the law in relation to privity of contract.

The respondents' submissions

[39] The plaintiffs on the other hand maintained that Green Crescent had agreed to the 'contra' settlement. They relied on the evidence of Yap Ah Bee, the director of the first defendant at all material times, as well as on the conduct of the first defendant to support their contention. The contention was that the three entities, namely Green Crescent, HAC Builders and HACB were all operating/administered from the same premises essentially as one entity. The plaintiffs maintained that the corporate veils of these three separate corporate entities ought to be lifted given the circumstances of the case, whereupon it could be concluded that Green Crescent had effectively consented to, and was privy to the contra arrangement.

[40] The plaintiffs further contended that Green Crescent is estopped from denying the existence of a 'contra' settlement', because it did not raise any objection to the correspondence between HAC Builders and Qudotech and Fei Wong Letrik, confirming that the said unit had been given to the purchaser pursuant to the 'contra' settlement.

[41] Reliance was placed on the fact that Yap Ah Bee was the one who signed the SPA for the said unit, and at that time he had full knowledge of the 'contra' settlement.

[42] Besides that, Green Crescent did not object to any of the reminder letters from the plaintiffs regarding the 'contra-agreement'. By its inaction and

conduct, the plaintiffs maintained that Green Crescent was estopped from denying the binding effect of the oral 'contra- agreement' between HAC Builders and Qudotech and Fei Wong Letrik.

[43] The plaintiffs further contended that if Green Crescent's refusal to abide by the terms of the contra-agreement were allowed, it would lead to injustice against them. They so contended on the grounds that Green Crescent was aware that due to the plaintiffs' belief that the debt had been set off against the purchase price of the said unit, both Qudotech and Fei Wong Letrik continued with the works. Green Crescent thereby reaped the benefits of the work done by the subcontractors. The plaintiffs are prejudiced because due to their reliance on the 'contra' agreement, they are out of time to file a cause of action against Green Crescent or HAC Builders for the unpaid monies.

The findings of the High Court

[44] As stated earlier the learned High Court judge held that the SPA dated 20 July 2001 must be read together with the contra-settlement, consequently the first plaintiff need not pay the purchase price and the termination of the SPA is void and unlawful.

[45] In arriving at this decision the learned trial judge was persuaded, inter alia, by the following factors:

(a) the contra-agreement for the settlement of the debt due and owing to Qudotech and Fei Wong Letrik by Green Crescent did not have to be in writing;

(b) the evidence of PW2, namely Yap Ah Bee, the common director of HAC Builders and Green Crescent who testified that he had suggested to the board of HACB (the public listed holding company) to resolve the debt by way of the contra agreement. He further testified that Green Crescent was agreeable to such an arrangement for the purposes of resolving the debt. To this end he had signed letters confirming the arrangement;

(c) the High Court concluded that Yap Ah Bee had held himself out as a director of HAC Builders, HACB as well as Green Crescent by signing documents on behalf of each of these entities. It was also concluded that the corporate veil ought, in the interests of justice to be lifted, particularly given the oral evidence of Yap Ah Bee on this subject; and

(d) the High Court concluded that Green Crescent was estopped from objecting to the validity of the contra agreement as it had not objected to the contra arrangement despite being aware of the existence of letters in relation to the contra arrangement for the unit. As such judgment was granted in favour of the plaintiffs.

The reasons for our decision

[46] It is a trite but oft stated principle that an appellate court will be slow to overturn the decision of a High Court judge, particularly after the trial of a suit, where the latter has enjoyed the audio-visual advantage of seeing and hearing witnesses first hand. The appellate courts are therefore ever vigilant to ensure that first tier decisions are not reversed simply on the grounds that the appellate court would have arrived at a different decision, but because no reasonable trier of fact would have arrived at such a conclusion based on the evidence before it. It bears repeating that an appellate court should and will intervene in circumstances where there are errors of law or where there is a lack of judicial appreciation of the evidence on record, giving rise in turn to an erroneous conclusion in law (see *Thomas v Thomas* [1947] AC 484, *Clarke v Edinburgh and District Tramways Co Ltd* [1919] SC (HL) 35, *Yuill v Yuill* [1945] P 15, *McGraddie v McGraddie and another* [2013] UKSC 58, *Anderson v City of Bessemer* 470 US 564 (1985), *Henderson v Foxworth Investments Ltd and another* [2014] UKSC 41, *Carlyle v Royal Bank of Scotland plc* [2015] UKSC 13, *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, *Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka* [2014] 9 CLJ 1064, *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309, *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453, *Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd* [2014] 1 MLJ 80; [2013] 9 CLJ 828.)

[47] In the instant case, the learned trial judge concluded that the 'contra-arrangement' between HAC Builders and Qudotech and Fei Wong Letrik was binding on Green Crescent.

[48] In so concluding it appeared to us, with respect, that the learned judge had failed to consider that all the contemporaneous documentary evidence pertaining to the alleged contra agreement subsists only between HAC Builders Sdn Bhd and Qudotech Sdn Bhd. Such contemporaneous documents comprised letters between HAC Builders and the subcontractors. There are no letters to or from Green Crescent in this regard. As such there is no contemporaneous documentary evidence from Green Crescent confirming the existence of the alleged contra agreement.

Lifting the corporate veil

[49] As stated earlier, the learned trial judge relied wholly on the oral evidence of Yap Ah Bee to find the requisite consent from Green Crescent. The basis for such implied or inferred consent from Green Crescent was Yap Ah Bee's allegation that he was a director of both Green Crescent and HAC Builders, and that these two entities together with their public listed holding

company, HACB, all functioned interchangeably as one unit. The question that arises for consideration is whether such oral averments in themselves are sufficient or adequate to warrant the conclusion that Green Crescent was party to, or privy to the 'contra-arrangement'.

[50] In the absence of any contemporaneous documents emanating from Green Crescent, the lack of any board minutes or resolutions of any kind in relation to the alleged 'contra-agreement', we were not persuaded that such consent could be reasonably inferred. It appeared to us that the learned judge had, with respect, erred in accepting in its entirety the evidence of Yap Ah Bee to the effect that he was acting interchangeably on behalf of Green Crescent as well as HAC Builders when he issued those letters. There was no reason to so conclude, save and unless the corporate veils of these two entities was lifted.

[51] In this context there was insufficient evidence available on record to warrant an inference that the corporate veils of these entities should be so lifted. As stated in the Federal Court decision of *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719:

> [96] But in the event that we should, we are of the view that it is now a settled law in Malaysia that the court would lift the corporate veil of a corporation if such corporation was set up for fraudulent purposes, or where it was established to avoid an existing obligation or even to prevent the abuse of a corporate legal personality.
>
> [97] As to what constitutes fraudulent purposes it has been described as to include actual fraud or fraud in equity. And fraud in equity occurred in '... cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies ...
>
> [98] Quite recently this court also discussed on the issue of lifting a corporate veil in the case of *Takako Sakao v Ng Pek Yuen & Anor* [2010] 1 CLJ 381. It said this:
>
> ...
>
> [22] A more recent statement of the doctrine of corporate personality is to be found in the case of *Woolfson v Strathclyde Regional Council* 1978 SLT 159 which is authority for the proposition that a litigant who seeks the court's intervention to pierce the corporate veil must establish special circumstances showing that the company in question is a mere facade concealing the true facts.
>
> [99] The phrase 'a mere facade concealing the true facts' was recently elaborated by the Supreme Court of the United Kingdom in the case of *Prest v Prest and Others.* The leading judgment of the court said this:
>
> The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is the imposition of a company or perhaps several

companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the 'facade' but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical. This may be illustrated by reference to those cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil.

[52] From the foregoing comprehensive exposition of the law relating to the lifting of the corporate veil, it is clear that there has to be sufficient evidence available to evidence the fact that a company has been set up for fraudulent purposes, or that the company in question is a mere facade concealing the true facts, or where there is evidence of the 'evasion principle' as described in *Prest v Prest and others* [2013] 4 All ER 673 above.

[53] There is no such evidence available here warranting either looking behind the facade of HAB Builders and Green Crescent, or for piercing the corporate veil.

[54] Perhaps more significantly, Yap Ah Bee's conduct on the one hand of maintaining that a contra arrangement existed which bound Green Crescent, and yet of insisting on the execution of a standard form sale and purchase agreement between Green Crescent and the prospective purchaser which made no mention of this contra agreement is entirely inconsistent. Yap Ah Bee testified at trial that the contra agreement was binding on Green Crescent. This testimony however came subsequent to the execution of a sale and purchase agreement between Green Crescent represented by the same Yap Ah Bee and the purchaser. The sale and purchase agreement requires the purchaser to pay the full purchase consideration for the unit failing which she has no entitlement to either legal or beneficial ownership of the unit. In these circumstances can it reasonably be concluded that:

(a) Yap Ah Bee's subsequent oral testimony at trial was credible? and

(b) a binding contra agreement subsisted alongside a written sale and purchase agreement containing terms directly in contradiction with the terms of the alleged contra agreement?

[55] In our respectful view, the answer to these questions must be no.

[56] Yap Ah Bee's conduct was wholly inconsistent, and negates the existence

of a binding contra agreement between Green Crescent, Qudotech and Fei Wong Letrik. As such we are of the considered view that the learned judge erred in accepting Yap Ah Bee's evidence to conclude that a contra agreement which was binding on Green Crescent subsisted so as to endow legal and beneficial ownership on the plaintiff without the payment of any consideration. In this context the learned judge also failed to consider that the existence and effect of the contra agreement was not addressed in the standard form sale and purchase agreement. In these circumstances the sale and purchase agreement prevailed over any alleged contra agreement.

CONCLUSION

[57] In summary the factual matrix of this case discloses that in an attempt to procure the plaintiffs who were their subcontractors to complete the project notwithstanding the lack of payment, HAC Builders through its director Yap Ah Bee, induced Qudotech and Fei Wong to complete their subcontract works with the promise of the transfer of certain housing units in place of monies. However these statements and offers remained inducements which did not become legally enforceable because no such offer emanated directly from the vendor Green Crescent. The doctrine of the privity of contract precludes any such statements or arrangements from becoming binding on Green Crescent, as it was never privy to, nor party to the same.

[58] Any such contra arrangement would ideally have required the existence of a written agreement whereby the debt due and owing by the main contractor, HAC Builders to Qudotech and Fei Wong Letrik being novated to Green Crescent and then resolved by the transfer of the relevant housing units to these subcontractors. That was not the case here. There was therefore no nexus between the debt due and owing by HAC Builders to the subcontractors and Green Crescent.

[59] There was also insufficient material to warrant the lifting of the corporate veil in the circumstances of this case. Apart from the subsequent oral evidence of Yap Ah Bee which was largely self-serving there was no other cogent evidence to support the application of the doctrine. In these circumstances we concluded that the appeal should be allowed with costs.

[60] We awarded costs of RM20,000 here and below to the appellant.

Appeal allowed with costs.

Reported by Afiq Mohamad